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No. 91-6516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EDWARD SOLDAL, ET AL.,

Petitioners,

vs.

COUNTY OF COOK, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1) Does the presence of a police officer at the scene of a private eviction constitute state action.

2) Are the protections of the Fourth Amendment inapplicable where there is no search for and no taking of property which could be used as evidence and no interference with any expectation of privacy.

3) Does the action of illegally evicting petitioners from their leased mobile home lot constitute a violation of petitioners' constitutional right to due process of law.

4) Are petitioners entitled to 42 U.S.C. § 1983 redress for a landlord/tenant dispute which resulted in petitioners' illegal eviction and incidental property damage.

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

Certiorari was granted to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Soldal v. County of Cook*, 923 F.2d 1241 (7th Cir. 1991), modified, *en banc*, in *Soldal v. County of Cook*, 942 F.2d 1073 (1991). The opinion of the United States District Court for the Northern District of Illinois is unreported. Copies of these opinions may be found within the parties' joint appendix at pages 3-89.

STATEMENT OF THE CASE

The instant action arose out of a landlord/tenant dispute between petitioners, Edward (hereinafter, Soldal) Mary, Jimmy, Alena, Joseph and Jessie and Willoway Terrace (Willoway), a mobile home park owned by Terrace Properties, one of the respondents herein. (Complaint, par. 2) On September 4, 1987, two Willoway workers, acting without a court order and in contravention of the Illinois Forcible Entry and Detainer Act (Ill. Rev. Stat. 1987, ch. 110, par. 9-101 *et seq.*) towed petitioners' mobile home off the park premises. At the behest of respondent Cook County Sheriff's Officer Lieutenant Jones, Willoway temporarily stored petitioners' mobile home at a construction company located next door to the park. (R. 56, Attachment C) Respondent Cook County Deputy Sheriff Shawn O'Neill was present merely to keep the peace during the eviction. (R. 56, Attachment C) Five days later, on September 9, 1987, the Circuit Court of Cook County ordered petitioners' mobile home returned to Willoway. (Complaint, par. 19)

During the eviction and the subsequent towing, petitioners' mobile home incurred incidental property damage: torn skirting, damaged external sewer and water boxes and damaged internal household items. (Complaint, pars. 11, 15) One year later, petitioners brought a 42 U.S.C. § 1983 cause of action in the District Court for the Northern District of Illinois, Eastern Division, seeking redress from respondents for the property damage incurred during the illegal eviction. Respondents are *inter alia*, Terrace Properties, Inc., Margaret Hale, Willoway's manager, and several lower echelon officers of the Cook County Sheriff's Office, in their individual capacities (collectively, respondents). (Complaint, pars. 4, 6)

Count I of petitioners' complaint, which is at issue in the instant action, alleged that respondents "conspired together to violate [petitioners' rights under the Fourth and Fourteenth Amendments to the United States Constitution] * * * by unlawfully evicting [petitioners], removing them from the trailer park, and destroying their property." (Complaint, pars. 31, 33) The District Court granted respondents' motion for summary judgment, finding that petitioners failed to establish the requisite state action to sustain a § 1983 cause of action. (J.A. 19-21)

Petitioners appealed the District Court's judgment to the United States Court of Appeals for the Seventh Circuit. A majority of the Court of Appeals affirmed the lower court's grant of summary judgment in favor of respondents. (J.A. 45) However, to reach the merits of petitioners' constitutional claims, the Court of Appeals "assumed" that petitioners had established the existence of a conspiracy amongst respondents. (J.A. 38) The Court of Appeals found that petitioners' Fourth Amendment and Due Process rights were not violated by respondents' actions. (J.A. 40-41, 42, 66)

Petitioners now appeal the Court of Appeals' judgment to this Court. Given the summary judgment posture of this cause, the following facts are taken in a light most favorable to petitioners. Prior to the eviction at issue here, on August 21, 1987, Willoway filed suit against petitioners in the Circuit Court of Cook County, Illinois. Pursuant to the Illinois Forcible Entry and Detainer Act, Willoway sought possession of the lot upon which petitioners' mobile home was located. The cause was set for hearing on September 22, 1987. (Complaint, par. 10) However, on September 4, 1987, Willoway decided to evict petitioners without a court order. Without informing the Cook County Sheriff's Office of their intention to evict petitioners with-

out a court order, Willoway management requested the presence of a deputy sheriff to maintain the peace during the eviction. (R. 56, Attachment C) Therefore, Captain Jackson dispatched Deputy Sheriff O'Neill to Willoway, instructing him to "stand by to maintain peace." (R. 56, Attachment C)

At approximately 1:00 p.m., two workers for Willoway arrived at the lot upon which petitioners' mobile home rested and began preparing the mobile home for removal. (R. 56, Attachment E, pp. 12-14) Deputy Sheriff O'Neill arrived at the lot at approximately the same time and remained in his squad car without speaking to the Willoway workers. (R. 56, Attachment E, p. 15) Petitioner Soldal left his mobile home and asked the workers what they were doing. They responded, "[A]sk the sheriff deputy." (R. 56, Attachment E, p. 16) Soldal then asked Deputy Sheriff O'Neill "[w]hat [he was] going to do about this?" O'Neill responded that "he was there to see that [Soldal] didn't interfere with Willoway's workers" and that he was "just doing what the chief told him." (R. 56, Attachment E, pp. 17-18) After a series of telephone calls with his attorney, Soldal telephoned either Chief Wittsman or Captain Levy of the Cook County Sheriff's Office. One of these men indicated that he was unaware of any deputy sheriff being dispatched to Willoway. (R. 56, Attachment E, pp. 24-25)

Lieutenant Jones arrived at the office of the park management at approximately 1:30 p.m. Ms. Hale informed Lieutenant Jones that Willoway was acting pursuant to a court order. However, since Ms. Hale was unable to produce an eviction order, Lieutenant Jones contacted Captain Jackson to determine the status of the eviction proceedings. Captain Jackson informed Lieutenant Jones that the eviction proceedings were still pending. Lieutenant Jones then realized that Willoway was not proceeding pursuant to a court order. (R. 56, Attachment C)

At this time, petitioner Soldal stated to Lieutenant Jones that he wanted to file a complaint against Willoway for criminal trespass to property. (R. 56, Attachments C and E, pp. 43-44) Lieutenant Jones then spoke with Assistant State's Attorney Dana Crowley. She advised Lieutenant Jones that the elements of criminal trespass were not present because possession was disputed between the parties. (R. 56, Attachment C) Jones informed Soldal that the "D.A. * * * said [he] couldn't file any complaint, that it was between the landlord and tenant. . . ." (R. 56, Attachment E, p. 46)

Simultaneously, the two Willoway workers were proceeding with the eviction, which resulted in the property damage at issue here. Respondent Sergeant James Hunt, of the Cook County Sheriff's Office, then escorted petitioners to a nearby motel, where Willoway had arranged four nights' paid accommodations. (R. 56, Attachment C)

SUMMARY OF ARGUMENT

This action arose out of a landlord/tenant dispute between private parties, which resulted in an illegal eviction with incidental property damage. Petitioners attempt to capitalize upon the mere presence of lower echelon officers of the Cook County Sheriff's Office during the eviction to convert their claim into a federal civil rights cause under 42 U.S.C. § 1983. Under the guise of § 1983, petitioners seek federal redress for what is essentially a state court action for damages.

To accomplish this, petitioners invoke the Fourth Amendment of the United States Constitution, alleging that towing their mobile home constituted a Fourth Amendment seizure. However, the Fourth Amendment is inapplicable to the instant cause. The origins of the Fourth Amendment establish that the evil at which the Amendment is directed is a governmental search or seizure which invades a person's privacy and which seeks to produce evidence capable of being used against that person. In keeping with those origins, decisions of this Court have consistently held that the Amendment protects privacy rights and is not applicable where property rights alone are involved. Not all aspects of privacy, however, are subject to Fourth Amendment protection. There exists a general right to privacy, the right to be let alone in solitude. This general right to privacy, in different contexts, is entitled to protection from various sources, mainly the property laws of the individual states. The Fourth Amendment, however, does not protect this privacy interest. Only where an intrusion on solitude includes a search or seizure for the potential disclosure of information are there any Fourth Amendment implications.

The respondents' relocation of the petitioners' mobile home intruded upon no privacy interest subject to Fourth Amendment protection. There was no gathering or attempt to gather information for any purpose. The respondents learned nothing which the petitioners reasonably expected to remain private. The facts which the petitioners have pleaded invoke only the concerns of local property law. To the extent, then, that the complaint alleged a Fourth Amendment violation, it was properly dismissed.

Similarly, petitioners seek redress through the substantive component of the Due Process Clause for the property damage incurred during the eviction. Substantive due

process does not apply under the facts of this case. Essentially, petitioners seek to protect their right to be free from an illegal eviction and incidental property damage. This interest does not rise to the level of fundamental interests to which this Court has extended substantive due process protection. Rather, procedural due process is applicable under the instant set of facts.

Here, to the extent that the actions of the private parties are attributable to the respondent deputy sheriffs, the behavior of these lower echelon officials is "random and unauthorized." The Cook County Sheriff's Office personnel were not acting pursuant to State procedure. Rather than effectuating State policy, their conduct was an aberration. The Court of Appeals properly recognized that *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) and its progeny govern the instant action. (J.A. 38-41)

Petitioners have "adequate state remedies" for the property damage they incurred during the illegal eviction. They are entitled to post-deprivation redress through the State of Illinois' tort claims mechanism. Therefore, Illinois has provided petitioners with all the process they are due. Under these facts, petitioners' right to procedural due process has not been violated.

Through § 1983, petitioners seek to convert a garden variety state tort claim for property damage into a federal constitutional cause of action. Petitioners advocate interpreting § 1983 and the constitutional Amendments at issue here in a manner that is completely devoid of the notion of federalism. Petitioners attempt to "federalize" the law of torts, thereby usurping a body of law that is properly relegated to the States.

ARGUMENT

I.

THE ILLEGAL ACTS OF A PRIVATE PARTY DO NOT CONSTITUTE "STATE ACTION", WHERE A POLICE OFFICER WAS MERELY PRESENT AT THE SCENE OF THE EVICTION.

In this case, Willoway Terrace, the owner of the mobile home park, decided to remove the petitioners' mobile home from its pad. Summoned by an agent of Willoway, Cook County Sheriff's police officers came to Willoway to maintain the peace during the eviction.

Respondents submit that any illegal actions by the private party, Willoway, should not be ascribed to the government merely because a governmental police officer was present to maintain the peace. If this were true, hundreds of differences of opinion between private citizens would be transformed into "state action", merely because a police officer arrives to mediate the problem, or to maintain the peace. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 32 L.Ed.2d 627, 92 S.Ct. 1965 (1972).

In *Moose Lodge*, this Court held that "the decision to discriminate could not be ascribed to any government decision;" here, similarly, the decision to pull the mobile home from its resting place cannot be ascribed to any government decision. To be "under color of" state law within § 1983, respondents urge that there be at least some significant action by a state or subdivision. "Careful adherence to the 'state action' requirement . . . avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L.Ed.2d 482, 102 S.Ct. 2744 (1982).

This Court, in *Lugar*, enunciated a two pronged test to establish the existence of "state action":

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state. *Lugar*, 457 U.S. at 937.

Under the circumstances of this case, the only way there can be the requisite state action is if there were a conspiracy between the public and private parties. The private parties actually relocated petitioners' mobile home, not the governmental officers. The necessity of establishing a conspiracy was recognized by the District Court. (R. 69, pp. 11, 12) Petitioners also recognized the need for a conspiracy. "At all times material . . . all the deputy sheriff defendants . . . were acting jointly and/or in conspiracy with these [civilian] defendants. . . ." (Complaint, par. 7) In Count I of their complaint, petitioners alleged "[Respondents] . . . reached an understanding, engaged in a sequence of events or joint course of conduct and/or otherwise agreed and conspired together. . ." (Complaint, par. 31) "These conspirac(ies)/joint action(s) was/were effected under color of law. . . ." (Complaint, par. 32)

It was the lack of evidence of a conspiracy that led the District Court to grant the governmental respondents' motion for summary judgment. (R. 69, p. 19) Implicit in that finding is that the actions of the deputy sheriffs did not rise to the level of state action, or the "significant aid" portion of the second prong of the *Lugar* test.

In contrast, the Court of Appeals, in the panel opinion, concluded that there was evidence of a conspiracy. The court stated:

> [Mr. Soldal] was certainly entitled to call on the police to obviate the need for self-help by preventing what undoubtedly was a criminal trespass to his property, since the trespassers were not acting under even a colorable entitlement. . . . The police prevented Soldal from exercising his statutory right to defend his property. That is state action. (J.A. 37)

In the *en banc* opinion, the Court of Appeals reiterated that the deputy sheriffs "prevented" petitioner Soldal from exercising his right to self-help, but stated that that might not have made the police actual participants. (J.A. 54) The *en banc* opinion then "assumes" a conspiracy.[1]

Officer O'Neill is the vehicle that the appellate court apparently used to find state action. Presumably, it was the alleged words he spoke to Soldal that the Court used

[1] Petitioners sued seven members of the Sheriff's Office, in their *individual* capacities. The evidence against Chief Wittsman and Captain Levy is that Soldal talked to *one* of these two men, who was simply unaware that a Cook County deputy sheriff had been dispatched to Willoway. Captain Jackson assigned Officer O'Neill to standby and maintain peace during the eviction. Rather than "conspiring" with Ms. Hale, Lieutenant Jones was merely attempting to determine whether Willoway had a court order to proceed with the eviction. Lieutenant Jones attempted to facilitate petitioner Soldal in filing a criminal complaint against Willoway. However, after discussing the case with the prosecutor's office, Lieutenant Jones determined that Willoway had not engaged in criminal behavior. Sergeant Hunt was present and led the Soldals to the motel after the eviction. There was no evidence offered by petitioners against either Officers Haritos or Vaid to suggest that they were even present at the scene. Those are the seven defendants. Only one of them spoke to the trailer park manager. There simply was no evidence that they conspired with each other or the private party respondents to deprive petitioners of their constitutional rights.

to conclude that Soldal was prevented from engaging in self-help. Yet, in an individual capacity lawsuit, one cannot be held accountable for the acts of another but only for one's own actions. *Rizzo v. Goode*, 423 U.S. 362, 371, 46 L.Ed.2d 561, 569, 96 S.Ct. 598, 605 (1976). Assuming, *arguendo*, that the words of Officer O'Neill created state action, the named respondents cannot, under existing case law, be saddled with that same conclusion. Only what each respondent did *personally* can be used against him to determine if, in each individual case, there was state action. It is abundantly clear that the actions of the police officer respondents do not come remotely close to the state action requirement. Without state action, a federal court does not have jurisdiction.

Petitioners have failed to establish a conspiracy between the private party respondents and the public respondents. Necessarily, viable § 1983 claims against both the private and public respondents require the existence of a conspiracy. Petitioners have failed to establish such a conspiracy. Therefore, their cause of action must fail.[2]

[2] The police officer respondents are being sued in their individual capacities. They are, therefore, entitled to qualified immunity. *Pierson v. Ray*, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967). Because of the summary judgment posture of this cause, the issue of qualified immunity was never addressed. Assuming this Court determines that one or more of the named respondents' conduct constituted state action and that the Fourth Amendment applies, then those defendants are entitled to qualified immunity. In *Procunier v. Navarette*, 434 U.S. 555, 55 L.Ed.2d 24, 98 S.Ct. 855 (1978), this Court held that public employees were entitled to immunity unless they knew or reasonably should have known that their actions violated a person's constitutional rights. At the time of this occurrence, the applicability of the Fourth Amendment to these facts was not clearly established. In *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1971), this Court declined to decide the applicability of the Fourth Amendment. As the Court

(Footnote continued on following page)

II.

THE FOURTH AMENDMENT IS NOT IMPLICATED BY THE CONDUCT IN THIS CASE SINCE THERE WAS NO SEARCH FOR, OR SEIZURE OF, EVIDENCE WHICH COULD BE USED AGAINST PETITIONERS OR WHICH VIOLATED PETITIONERS' FOURTH AMENDMENT PRIVACY RIGHTS.

The petitioners contend that the conduct of the respondents violated the Fourth Amendment of the United States Constitution. In particular they contend that the relocation of their mobile home and its contents was "governed by" the Fourth Amendment because "the Fourth Amendment applies to all seizures whether or not they occur in the context of a criminal case." (Pet. Br. 15) The petitioners argue further that the respondents' conduct violated petitioners' Fourth Amendment possessory rights in their property and petitioners' privacy rights "to be let alone" from governmental intrusion.

The origins and development of Fourth Amendment principles call for the rejection of petitioners' arguments. The Fourth Amendment protects a person from searches and seizures aimed at obtaining evidence against that person. It protects a person's privacy, the right to be free from governmental prying to obtain evidence which might be used in some fashion against that person. An interference which affects only property interests, without an accompanying search for evidence or gathering of information, is not the subject of Fourth Amendment protection.

[2] *continued*
of Appeals noted in its *en banc* opinion, this is a question of "surprising novelty" for which there is no clear exposition of authority. (J.A. 55) Given the unsettled history, this is the classic instance where qualified immunity applies.

Here, there was a relocation of petitioners' mobile home, an interference with property rights, but not a seizure for purposes of the Fourth Amendment. The mobile home was returned to its owners. It was neither taken nor held for evidentiary purposes. There was no search, no prying within the mobile home, and no gathering of information concerning the petitioners. For these reasons, the petitioners' claim of a Fourth Amendment violation is without merit.

A.

THE FOURTH AMENDMENT IS NOT IMPLICATED BY THE RELOCATION OF THE PETITIONERS' MOBILE HOME SINCE THERE WAS NO SEARCH AND NO HOLDING OF EVIDENCE WHICH COULD BE USED AGAINST PETITIONERS.

The Fourth Amendment to our Constitution was a direct response to the unpopular searches and seizures which had previously arisen under General Warrants in England and Writs of Assistance in the Colonies. The famous English trials of *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763) and *Entick v. Carrington*, 19 St. Tr. 1029 (1765), describe the Secretary of State's practice of issuing, without probable cause, general warrants authorizing the search of a citizen's home and seizure of his personal papers for examination by the Secretary. In similar fashion in the Colonies, Writs of Assistance authorized general searches and seizures to discover smugglers and confiscate their goods. Frankael, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 364 (1920). Writing in *Entick v. Carrington*, 19 St. Tr. at 1073, Lord Camden linked the evil inherent in unreasonable searches to that of compelled self accusation:

> It is very certain, that the law obligeth no man to accuse himself; because the necessary means of com-

> pelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.

Commenting on the origins of the Fourth Amendment over a century later, the Court in *Boyd v. United States*, 116 U.S. 616, 630, 29 L.Ed. 746, 751, 6 S.Ct. 524, 534 (1885), similarly likened that Amendment to what had become the Fifth Amendment privilege against self-incrimination. At issue in *Boyd* was the propriety of a court order that the petitioner produce an invoice for twenty-nine cases of plate glass which were the subject of a forfeiture for a violation of customs laws. Treating the order as an attempt to seize the papers contrary to the Fourth Amendment and viewing the case as quasi-criminal in nature, the Court again drew a parallel between the Fourth and Fifth Amendments:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other. 116 U.S. at 630.

That the Fourth Amendment was directed against searches for, and seizures of, evidence to be used against a citizen was reiterated in *Interstate Commerce Commission v. Baird*, 194 U.S. 25, 48 L.Ed. 860, 24 S.Ct. 563 (1903). In *Baird*, the respondent argued that a statute requiring production of certain contracts violated his Fourth Amendment rights against unreasonable search and seizure. *Id.* at 35. With reliance on *Boyd*'s analogy between the Fourth and Fifth Amendments, the Court dismissed

the argument because, by statute, the respondent was immunized from any prosecution which might be based on the documents produced. *Id.* at 46. Since the items to be seized could not be used against the respondent, there were no Fourth Amendment implications.

The analogy drawn in all of these earlier cases between the Fourth and Fifth Amendments makes it clear that the core of the Fourth Amendment pertains to the search and seizure of evidence to be used against people. The concern in *Entick v. Carrington*, 19 St. Tr. at 1074, for example, was whether "a right of search for the sake of discovering evidence ought in any case to be allowed. . . ."

Later cases which discussed the origins of the Fourth Amendment moved away from a comparison of that Amendment to the privilege against self-incrimination. Each of them, however, continued to place the roots of the Fourth Amendment in the colonists' reaction to the pre-revolutionary use of general warrants to invade the homes and privacy of persons in search of evidence. The case of *Weeks v. United States*, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341 (1914), concerned a warrantless search of a home to support a charge of illegal transportation of lottery tickets. This Court traced the origin of the Fourth Amendment to the earlier reaction against general warrants and the abuse of governmental authority to search and to seize citizens' private papers "in support of charges, real or imaginary, made against them." *Id.* at 390.

The Court in *Frank v. Maryland*, 359 U.S. 360, 365, 3 L.Ed.2d 877, 882, 79 S.Ct. 804, 808 (1959), noted the earlier comparisons of the Fourth and Fifth Amendments, but found that question irrelevant in determining what is protected by the Fourth Amendment:

> Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and

> Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought.

The Court in *Frank* went on to hold that there were no Fourth Amendment implications in a housing inspector's attempted warrantless inspection of a home since, "[n]o evidence for criminal prosecution is sought to be seized." 359 U.S. at 366.

The later opinion in *Camara v. Municipal Court*, 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967), expressed no quarrel with the analysis of the Fourth Amendment's purpose in *Frank*, but only with the limitation of the Amendment's protection to cases involving criminal prosecution. The *Camara* opinion refers repeatedly to the activity of the housing inspector as an "inspection," a "search," or an "administrative search." Whatever the terminology, the Court's concern was that the inspector was conducting a warrantless search for information. Whether the fruits of the search were to further prosecution of the criminal laws or to enforce the building codes, the Court found immaterial. What is material for Fourth Amendment purposes is that the inspector looks for information to be used as evidence and that the "inspections of the kind we are here considering do in fact jeopardize 'self-protection' interests of the property owner." 387 U.S. at 531. As a result, the Court held that a housing inspection required either consent, exigent circumstances, or a warrant.

What is apparent in the origins of the Fourth Amendment, and not contradicted by any of its later development, is that the Amendment is not applicable to every governmental trespass or taking of property. The drafters of the Article directed it to a very specific problem, government's invasion for the purpose of obtaining evidence to be used in some fashion against its citizens. This offers the only explanation for the Court's conclusion that the Amendment "has no reference to civil proceedings for recovery of debts, of which a search warrant is not made part." *Den v. The Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 285, 15 L.Ed. 372 (1856).

That the Fourth Amendment has no application to the facts of this case is apparent in Justice Learned Hand's statement of the purpose of the Amendment:

> [I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. *United States v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930).

In this case, there was no securing of evidence against the petitioners. There was no rummaging about among their effects and no search. The respondents seized nothing to be used against the petitioners. As a result of their actions, respondents learned nothing about the petitioners which they did not know before. For these reasons, there was no violation of petitioners' Fourth Amendment rights and the decisions to deny relief upon petitioners' complaint should be affirmed.

B.

THE FOURTH AMENDMENT IS NOT IMPLICATED BY THE RELOCATION OF THE PETITIONERS' MOBILE HOME SINCE THERE WAS NO INTRUSION ON THE PETITIONERS' EXPECTATION OF PRIVACY WITHIN THE MEANING OF THE FOURTH AMENDMENT.

The "invasion of a man's privacy," noted in the above quote from Judge Learned Hand, has become the touchstone of all modern analysis of the Fourth Amendment.

Oliver v. United States, 466 U.S. 170, 177, 80 L.Ed.2d 214, 223, 104 S.Ct. 1735, 1740-41 (1984). Nowhere is this more apparent than in the differences between two major eavesdropping cases of this century. In *Olmstead v. United States*, 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564 (1927), government agents obtained evidence by tapping the telephone lines of the defendants' homes and offices. The court found no Fourth Amendment violation because there was no physical entry of the premises. 277 U.S. at 464.

Forty years later, the Court overruled *Olmstead* in a case where agents electronically monitored the defendant's conversation in a phone booth. *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967). In so doing the Court refused to characterize the issue in terms of whether the telephone booth was a "constitutionally protected area." Quoting *Warden v. Hayden*, 387 U.S. 294, 304, 18 L.Ed.2d 782, 790, 87 S.Ct. 1642, 1648 (1967), the Court announced that the "premise that property interests control the right of the Government to search and seize has been discredited." *Katz*, 389 U.S. at 352. The Court then rephrased the issue, not in terms of property interests, but privacy interests, i.e., whether the Government's act of listening to the petitioner's words "violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353.

In *Warden v. Hayden*, 387 U.S. 294, 18 L.Ed.2d 782, 87 S.Ct. 1642 (1967), the Court had at length reviewed the earlier notion that Fourth Amendment analysis involved a balancing of competing property interests in the place searched or the item seized. After looking at the history and development of the Amendment, the Court

rejected the property rights analysis and concluded that the Fourth Amendment protects privacy rather than property. "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts." 387 U.S. at 304.

After *Katz* and *Hayden*, the fact that the Fourth Amendment protects privacy was again noted in *Wyman v. James*, 400 U.S. 309, 27 L.Ed.2d 408, 91 S.Ct. 381 (1971), which considered the constitutionality of a statute allowing for termination of welfare benefits to a recipient who refused a home visit by a caseworker. The Court first noted that it "consistently has been most protective of the privacy of the dwelling." 400 U.S. at 316. The Court, though, upheld the statute, in part because the protection of privacy was not a factor "for the seemingly obvious and simple reason that we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term." 400 U.S. at 317. The entry into the home did not in itself invoke the Fourth Amendment since, with no significant investigative purpose, it involved no violation of privacy rights.

In *Cardwell v. Lewis*, 417 U.S. 583, 41 L.Ed.2d 325, 94 S.Ct. 2464 (1974), where the police took paint scrapings from the exterior of the defendant's impounded automobile, a plurality of the Court rejected the defendant's Fourth Amendment challenge. "Rather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy." 417 U.S. at 589. Without an intrusion into the car's interior, no expectation of privacy was impinged. 417 U.S. at 591.

That the Fourth Amendment protects privacy interests rather than property interests remains at the core of this

Court's decisions. "The central purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *South Dakota v. Opperman*, 428 U.S. 364, 377, 49 L.Ed.2d 1000, 1009-10, 96 S.Ct. 3092, 3101 (1976) (Powell, J., concurring). The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7, 53 L.Ed. 538, 546, 97 S.Ct. 2476, 2481 (1977). "The Fourth Amendment protects legitimate expectations of privacy rather than simply places." *Illinois v. Andreas*, 463 U.S. 765, 771, 77 L.Ed.2d 1003, 1010, 103 S.Ct. 3319, 3324 (1983).

It is the Fourth Amendment's protection of privacy, rather than property rights, that is at the heart of this Court's opinions involving the seizure of items in plain view. Since the Fourth Amendment offers no protection for what a person knowingly displays to the public, *United States v. Dionisio*, 410 U.S. 1, 14, 35 L.Ed.2d 67, 79, 93 S.Ct. 764, 771 (1973), a seizure of property in plain view is not an invasion of privacy, is presumptively reasonable, and is not in itself a violation of the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 587, 63 L.Ed.2d 639, 651, 100 S.Ct. 1371, 1380 (1980). The plurality opinion in *Texas v. Brown*, 460 U.S. 730, 739, 75 L.Ed.2d 502, 511, 103 S.Ct. 1535, 1541 (1983), stated that the principle supporting the plain-view doctrine is the "recognition that when a police officer has observed an object in 'plain-view,' the owner's remaining interests in the object are merely those of possession and ownership. . . ." The majority opinion in *Illinois v. Andreas*, 463 U.S. 765, 771, 77 L.Ed.2d 1003, 1010, 103 S.Ct. 3319, 3324 (1983), presents the principle even more clearly: "The plain-view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item firsthand, its

owner's privacy interest in that item is lost; the owner may retain the incidents of the title and possession but not privacy."

The petitioners' argument that the Fourth Amendment protects possessory rights, if understood to mean that there can be a Fourth Amendment violation where no privacy right is involved, is simply contrary to this Court's decisions. A seizure of property, of course, involves by definition "some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 80 L.Ed.2d 85, 94, 104 S.Ct. 1652, 1656 (1984). However, no case holds that an interference with that possessory interest in itself violates the Fourth Amendment. The police seized the paint scrapings in *Cardwell v. Lewis*, 417 U.S. 583, 41 L.Ed.2d 325, 94 S.Ct. 2464 (1974), thus intruding on a possessory interest, but committed no Fourth Amendment violation since no expectation of privacy was impinged. 417 U.S. at 591. The officer in *Texas v. Brown*, 460 U.S. 730, 75 L.Ed.2d 502, 103 S.Ct. 1535 (1983) seized the defendant's balloon without a Fourth Amendment violation because the owner had a possessory interest but no privacy interest.

The basis of the Court's holding in *Hudson v. Palmer*, 468 U.S. 517, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984), was Palmer's lack of privacy rights. The Court phrased the issue before it as "whether a prison inmate has a reasonable expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable searches and seizures." 468 U.S. at 519. Later, the Court stated the seminal principle of Fourth Amendment protection: "The applicability of the Fourth Amendment turns on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by govern-

ment action." 468 U.S. at 525 (quoting *Smith v. Maryland*, 442 U.S. 735, 740, 61 L.Ed.2d 220, 226, 99 S.Ct. 2577, 2580 (1979)). In *United States v. Karo*, 468 U.S. 705, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984), discussing the significance of possessory interests in the context of a seizure, the Court said: "The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, however, for an actual trespass is neither necessary nor sufficient to establish a constitutional violation." 468 U.S. at 712-713. A purely possessory interest may be relevant in determining the existence of an expectation of privacy, but that interest in itself is insufficient to warrant Fourth Amendment protection. *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978).

The petitioners' reliance on *United States v. Place*, 462 U.S. 696, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983), ignores the entire context of the seizure in the case and the fashion in which the Court phrased the issue. Involved in *Place* was not simply a detention of a piece of luggage, but, as the Court repeatedly called it, an "investigative detention" of the property. The luggage was detained so that government agents could determine its contents. Hence, the Court set out the issue as "whether the Fourth Amendment prohibits law enforcement authorities from temporarily detaining personal luggage for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics." 462 U.S. at 697-698. Underlying the entire analysis was the fact that the purpose of the seizure was to learn the contents of the luggage. From that starting point, the Court went on to determine whether the seizure was reasonable. In so doing, the Court noted, in reliance on *United States v. Chadwick*, 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977), that the purpose of the Fourth Amendment is to protect

against intrusions on legitimate expectations of privacy and that a person has a privacy interest in the contents of personal luggage. *Place*, 462 U.S. at 706-707. Taken in its context, therefore, the *Place* opinion supports the premise that the object of the Fourth Amendment is the protection of privacy. *Cardwell v. Lewis*, 417 U.S. at 589.

C.

THE FOURTH AMENDMENT IS NOT IMPLICATED BY THE RELOCATION OF THE PETITIONERS' MOBILE HOME SINCE THE PETITIONERS' GENERAL RIGHT TO PRIVACY, THE RIGHT TO BE LET ALONE, IS NOT IN ITSELF THE SUBJECT OF FOURTH AMENDMENT PROTECTION.

Since the Fourth Amendment protects against unreasonable intrusions upon legitimate expectations of privacy, the validity of the petitioners' Fourth Amendment claim requires the violation of a privacy right. The petitioners claim the right violated was their right of seclusion or solitude, the right to be let alone. (Pet. Br. p. 34) The opinions of this Court, however, indicate that there is no "right of seclusion" protected by the privacy concerns of the Fourth Amendment.

The petitioners are correct to point out the distinction which Judge Posner has made between the two interests embraced in the word "privacy." Posner, *Rethinking the Fourth Amendment*, 1981 Sup. Ct. Rev. 49, 51, n. 7 (1981). Privacy includes the concept of solitude or seclusion, the right to be left alone without interruption. On the other hand, privacy involves the idea of secrecy, concealment of information from others. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173, 174 (1979). If the petitioners' privacy was violated in this case, such a violation pertains, as petitioners

contend, to an encroachment on their seclusion or solitude. Petitioners do not, and cannot, maintain that the respondents in any way pried into matters intended to be kept secret.

Privacy in the sense of solitude, that "right to be left alone" from the intrusion of others, however, is not a right protected by the Fourth Amendment. Neither Judge Posner nor this Court has ever maintained that the Fourth Amendment extends to such a right. Judge Posner's writings are consistent with the opinion he rendered below in this case. While the Judge acknowledged the concept of privacy as seclusion, he made it clear that the Constitution establishes no general right to be left alone. "There is no suggestion of such a right in the Constitution. There are simply particular rights to be free from specific forms of invasion of privacy." Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. at 181.

More importantly, this Court has consistently recognized that what has been called the right to be left alone is not cognizable under the Fourth Amendment. In *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), the Court acknowledged a "right to be let alone by other people," which it called a "*general* right to privacy." 389 U.S. at 350. But that right, the Court said, is not the subject of the Fourth Amendment. "[T]he Fourth Amendment cannot be translated into a general constitutional right to privacy." 389 U.S. at 350. On the contrary, "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." 389 U.S. at 350-351. (Emphasis in original).

That "general" right to privacy, the right to be left alone referred to in *Katz*, is given protection from a number of sources depending on the context of the intrusion. *Katz* left the protection mainly to state law. The same view is present in *Oliver v. United States*, 466 U.S. 170, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984): "The law of trespass recognizes the interest in possession and control of one's property and for that reason permits exclusion of unwanted intruders." 466 U.S. at 183, n.15. Protection in some particular cases can arise from the Constitution. *Katz*, for example, noted protection at times in the Freedom of Association Clause of the First Amendment, the Third Amendment's prohibition against quartering of soldiers in time of peace, and the Fifth Amendment. 389 U.S. at 350, n.5. In other contexts, the Court has seen protection in the Due Process Clause of the Fifth and Fourteenth Amendments. *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972).

In this case, the right to exclude others, for which petitioners claim Fourth Amendment protection, is, as the majority below concluded, actually a property right. Cases discussing the right in the context of the Takings Clause of the Fifth Amendment certainly considered it as such. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82, 64 L.Ed.2d 741, 752, 100 S.Ct. 2035, 2041 (1980), the Court observed that "one of the essential sticks in the bundle of property rights is the right to exclude others." Similarly, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982), the Court treated the power to exclude others as a property right and concluded that "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." 458 U.S. at 436.

The current petitioners were disturbed in the possession of their property. To the extent that their solitude

has been infringed, they certainly have a remedy, but not one that flows from the Fourth Amendment. "It is privacy that is protected by the Fourth Amendment, not solitude." *O'Connor v. Ortega*, 480 U.S. 709, 730, 94 L.Ed.2d 714, 731, 107 S.Ct. 1492, 1504 (1987) (Scalia, J., concurring).

III.

THE ACTION OF ILLEGALLY EVICTING PETITIONERS FROM A LEASED MOBILE HOME LOT DID NOT AMOUNT TO A VIOLATION OF PETITIONERS' DUE PROCESS RIGHTS.

The instant action originated in a landlord/tenant dispute over a leased lot upon which petitioners' mobile home rested. Respondents, without properly invoking the procedural mechanisms of the Illinois Forcible Entry and Detainer Act, simply removed petitioners' mobile home from their property. In accomplishing the eviction, respondents removed the skirting from petitioners' mobile home, disconnected the mobile home from the utilities that were servicing it, unmoored the mobile home, and towed it from the lot. (Complaint, pars. 11, 31) The mobile home was subsequently returned to petitioners.

Petitioners brought this 42 U.S.C. § 1983 action, alleging in the complaint that respondents, *inter alia*, violated their rights under the Fourteenth Amendment to the United States Constitution to substantive and procedural due process by "unlawfully evicting [petitioners] and destroying and damaging their property." (Complaint, Ct. I, par. 33) However, before this Honorable Court and the Court of Appeals, petitioners disavow any claim to § 1983 relief based upon a denial of *procedural* due process. (J.A. 39; Pet. Br. 39-40) Respondents contend that the illegal eviction here, though subject to a State damage action, was not a violation of petitioners' due process rights.

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property without due process of law." This Court has construed the Due Process Clause to afford three different kinds of constitutional protection. Although not at issue here, Due Process incorporates the specific protections defined in the Bill of Rights. *Daniels v. Williams*, 474 U.S. 327, 337, 88 L.Ed.2d 662, 672, 106 S.Ct 662, 677 (1986) (Stevens, J., concurring in judgments). The second and most common guarantee associated with Due Process is the guarantee that the government will not deprive an individual of life, liberty or property without providing appropriate procedural safeguards. *United States v. Salerno*, 481 U.S. 739, 746, 95 L.Ed.2d 697, 708, 107 S.Ct. 2095, 2101 (1987). Petitioners, however, attempt to invoke the third guarantee, the substantive component of the Due Process Clause, which bars certain arbitrary, wrongful government action "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125, 108 L.Ed.2d 100, 113, 110 S.Ct. 975, 983 (1990) (citing *Daniels v. Williams*, 474 U.S. at 331).

A distinguishing factor between the procedural and substantive guarantees of the Due Process Clause is the timing of the constitutional violation. If the substantive component of the Due Process Clause has been violated, the constitutional violation is complete as soon as the prohibited action is taken. Without more, an "independent federal remedy is then authorized by the language and legislative history of § 1983." *Daniels*, 474 U.S. at 338 (Stevens, J., concurring in judgments). However, in the context of procedural due process, the failure of the State to provide procedural redress or response is the crux of the constitutional violation. Thus, in many "tort-type" cases where private property has been damaged, the con-

stitutional violation occurs upon the State's failure to afford the claimants "adequate State remedies" to seek redress. *Id.*; *see Parratt v. Taylor*, 451 U.S. 527, 538, 68 L.Ed.2d 420, 430, 101 S.Ct. 1908, 1914 (1981), *overruled in part, not relevant here*, by *Daniels v. Williams*, 474 U.S. at 330-331.

Petitioners characterize the alleged due process violation as substantive in nature. In an attempt to convert what is essentially a procedural due process issue into a substantive due process issue, petitioners focus solely upon the damage inflicted upon their property, rather than viewing the entire sequence of events. Petitioners contend, irrespective of the context in which their property was damaged, such damage constitutes a violation of their right to substantive due process. However, since the *Lochner* era of this Court (*Lochner v. New York*, 198 U.S. 45, 49 L.Ed. 937, 25 S.Ct. 539 (1905)), narrow circumscription of the substantive guarantees afforded by the Due Process Clause has been the guiding principle. *See Ferguson v. Skrupa*, 372 U.S. 726, 10 L.Ed.2d 93, 83 S.Ct. 1028 (1963).

Substantive due process rights, unlike, e.g., property rights, are created only by the Constitution. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229, 88 L.Ed.2d 523, 534, 106 S.Ct. 507, 513-514 (1985) (Powell, J., concurring). Casting aside the argument that text and ancient history are against the notion of substantive due process (*see Den v. The Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276, 15 L.Ed. 372, 374 (1856); *Ewing*, 474 U.S. at 225-226; *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 465 (7th Cir. 1988)), this Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce

and open-ended." *Collins v. Harker Heights*, 503 U.S. ___, ___, 117 L.Ed.2d 261, 273, 112 S.Ct. 1061, 1068 (No. 90-1279, February 26, 1992). As Justice White cautioned, "[T]he Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause," noting that, "Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Moore v. City of East Cleveland*, 431 U.S. 494, 544, 52 L.Ed.2d 531, 565, 97 S.Ct. 1932, 1959 (1977) (White, J., dissenting).

Proceeding with caution and restraint, the Court has reserved substantive due process protections for certain, specified areas of individual civil liberties that lie at the heart of a free society. The substantive component of the Due Process Clause protects only those interests that are "deeply rooted in this Nation's history and tradition." *Griswold v. Connecticut*, 381 U.S. 479, 501, 14 L.Ed.2d 510, 543, 85 S.Ct. 1678, 1691 (1965) (Harlan, J., concurring); *Moore*, 431 U.S. at 503. The Court has invoked substantive due process when government action interferes with rights "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [they] were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L.Ed. 288, 292, 58 S.Ct. 149, 152 (1937). Stated another way, substantive due process protects against government action that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L.Ed. 674, 677, 54 S.Ct. 330, 332 (1934).

The Court has invoked the aid of substantive due process when a State has attempted to impermissibly "deprive" its citizens of their freedom of choice within the private realm of marriage, family life or procreation. This Court

found such "deprivations" violative of the substantive due process clause, irrespective of the procedural mechanisms afforded by the State. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 67 L.Ed. 1042, 43 S.Ct. 625 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 571 (1925); *Poe v. Ullman*, 367 U.S. 497, 6 L.Ed.2d 989, 81 S.Ct. 1752 (1961); *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965); *Loving v. Virginia*, 388 U.S. 1, 18 L.Ed.2d 1010, 87 S.Ct. 1817 (1967); *Eisenstadt v. Baird*, 405 U.S. 438, 31 L.Ed.2d 349, 92 S.Ct. 1029 (1972); *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973); and *Moore v. City of East Cleveland*, 431 U.S. 494, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977). With all due respect, petitioners' right to be free from an *illegal* eviction, as compared to a legal eviction, is not one of the "fundamental" interests to which this Court has been willing to extend the heightened constitutional protection of substantive due process. *See Moore*, 431 U.S. at 537 (Stewart, J., dissenting); *Harrah Independent School District v. Martin*, 440 U.S. 194, 198, 59 L.Ed.2d 248, 254, 99 S.Ct. 1062, 1064 (1979); *Ewing*, 474 U.S. at 229-230 (Powell, J., concurring).

In an attempt to invoke the "shock the conscience" standard carefully delineated by this Court in *Rochin v. California*, 342 U.S. 165, 96 L.Ed.183, 72 S.Ct. 205 (1952) (*see also* 25 A.L.R. 2d 1396 (1952)), petitioners, in their brief, characterize respondents' actions as violative of their "fundamental right to their home." (Pet. Br. 50) Petitioners' mobile home was damaged during the illegal eviction. But, it is important to keep in mind that, even in a legal eviction involving a mobile home, disconnecting the utilities and "unmooring" the structure would be necessary. Again, with all due respect to petitioners, the incidental property damage that they sustained as the result of an illegal eviction is hardly the type of governmental conduct that

"offend[s] even the hardened sensibilities", that is "so offensive to human dignity" or that "shocks the conscience" of this Court so as to warrant protection under the substantive component of the Due Process Clause.

The crux of petitioners' claim is their illegal eviction from the mobile home park. The State of Illinois enacted the Forcible Entry and Detainer Act to provide its residents the complete remedy at law for settling disputes over possession of real property. *People v. Evans*, 163 Ill. App. 3d 561, 564, 516 N.E.2d 817, 819 (1987); Ill. Rev. Stat. 1987, ch. 110, par. 9-101 *et seq.* In derogation of the common law, this Act prohibits resolution of landlord/tenant disputes through forcible self help. *City of Chicago v. Steamship Lines*, 328 Ill. 309, 312, 159 N.E. 301, 303 (1927); *Doty v. Burdick*, 83 Ill. 473, 477 (1876).

The State of Illinois has chosen to channel landlord/tenant disputes through the judicial process, thereby affording the parties notice and a "right to be heard" prior to dispossession. The Forcible Entry and Detainer Act is the procedural mechanism whereby the State of Illinois "minimize[s] substantively unfair or mistaken deprivations of property." *Fuentes v. Shevin*, 407 U.S. 67, 80-81, 32 L.Ed.2d 556, 570, 92 S.Ct. 1983, 1994 (1972). As the facts of this case bear out, petitioners were "mistakenly deprived of their property" by the actions of respondents, and a state court action for damages should follow.

Petitioners' characterization notwithstanding, the Seventh Circuit Court of Appeals properly recognized that the facts of the instant cause necessitate resolution under the procedural component of the Due Process Clause. (J.A. 38-40)[3]

[3] *See Graham v. Connor*, 490 U.S. 386, 104 L.Ed.2d 443, 109 S. Ct. 1865 (1989). Although the cause there was pled and decided in the lower courts on substantive due process grounds, this Court evaluated the claim on Fourth Amendment grounds.

Petitioners were entitled to procedural due process: notice and an opportunity to be heard prior to being evicted from the mobile home park. However, it appears from the evidence that the eviction was accomplished through the "random and unauthorized" action by respondents. Petitioners have a cause of action for damages, but not one under the Civil Rights Act for a violation of the Fourth and Fourteenth Amendments.

The facts of this case fall squarely within the confines of *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), *overruled in part, not relevant here, by Daniels v. Williams*, 474 U.S. at 330-331, and *Hudson v. Palmer*, 468 U.S. 517, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984) (extending rationale of *Parratt* to intentional deprivations of property). In *Parratt*, a state prisoner brought a § 1983 action against prison officials, alleging that their negligent loss of his mail-order hobby kit "deprived [him] of his property and Due Process of Law." *Parratt*, 451 U.S. at 536. Analyzing Parratt's claim under procedural due process, this Court reasoned that, where the "tortious loss" of his property was the "result of a random and unauthorized act by a state employee, * * * the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur." *Id.* at 541. The Court found that, under these circumstances, "the existence of an adequate state remedy to redress property damage inflicted by state officers" provides all the process that is due. *Id.* at 542-544.

In the instant cause, petitioners were clearly not deprived of their property as the result of an established state procedure or policy. Rather, when circumventing the Illinois Forcible Entry and Detainer Act, the only evidence is that respondents acted in a "random and unauthorized" manner.[4] However, petitioners were not deprived of due process of law because the laws of the State of Illinois afford them post-deprivation redress for their property damage. Petitioners are clearly entitled to bring a state tort claim against respondents to recover damages for the incidental property damage they sustained. (*See, e.g., Rosenthal v. City of Crystal Lake*, 171 Ill. App. 3d 428, 525 N.E.2d 1176 (2d Dist. 1988) (trespass))[5] Petitioners do not contend that these state court remedies are inadequate to compensate them for the property damage incurred. Moreover, petitioners have in fact already sought and been afforded some redress for the illegal eviction (petitioners' mobile home was reinstated in the mobile home park pursuant to court order). (*See* Complaint, pars. 19, 20; J.A. 7-8, 30) Therefore, due to the adequate state remedies available and granted to petitioners through state procedures, petitioners were not deprived of procedural due process.

For the reasons set forth above, respondents respectfully request this Court affirm the decision of the courts below, finding there to be, as a matter of law, no violations of the Due Process Clause.

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[4] A conspiracy may in fact be a random act if, "from the point of view of the state[,] * * * the state cannot anticipate or control such conduct in advance." *Easter House v. Felder*, 910 F.2d 1387, 1399 (7th Cir. 1990), *cert. denied*, ___ U.S. ___ (1991) citing *Holloway v. Walker*, 790 F.2d 1170, 1172 (5th Cir. 1986), *cert. denied*, 479 U.S. 984 (1986). *See also National Communications v. Michigan Public Service*, 789 F.2d 370, 372-373 (6th Cir. 1986), *cert. denied*, 479 U.S. 852 (1986).

[5] Although the state remedies may not provide all the relief which may have been available under a § 1983 claim (e.g., attorneys' fees), the requirements of the due process clause are satisfied if the post-deprivation remedy compensates for the property damage. *Parratt v. Taylor*, 451 U.S. 527, 543-544, 68 L.Ed.2d 420, 434, 101 S.Ct. 1908, 1917 (1981).

IV.

PETITIONERS, WHOSE PROPERTY HAS BEEN DAMAGED AS THE INCIDENTAL RESULT OF AN ILLEGAL EVICTION, SHOULD NOT BE AFFORDED A 42 U.S.C. § 1983 CAUSE OF ACTION.

Petitioners assert that the Court of Appeals found, because "petitioners were really bringing a due process claim," the existence of adequate state remedies foreclosed relief on their Fourth Amendment claim. (Pet. Br. 37-46) The Court of Appeals, however, explicitly noted that the existence of state remedies has no bearing on whether a Fourth Amendment claim is actionable. (J.A. 41) As stated above, the Court of Appeals properly analyzed petitioners' Fourth Amendment claim and found that it must fail because no Fourth Amendment violation occurred.

The majority of the Court of Appeals stated:

> The existence of adequate legal remedies for an illegal eviction such as occurred here—state remedies if they are adequate, a federal remedy under the due process clause if not—is pertinent to deciding whether the Fourth Amendment should be bent to provide the Soldals with still another remedy. Bent it would have to be, because the amendment was never intended to regulate garden-variety commercial disputes of the sort involved in this case. Why bend, when the Soldals had adequate alternatives? (J.A. 56)

The above quoted portion merely evinces the Court of Appeals' recognition that there is an interplay between constitutional interpretation and our federalist system of government. As Judge Easterbrook made clear in his concurrence:

> Dragooning [a claim such as petitioners'] into federal court under the aegis of 42 U.S.C. § 1983 is lexically possible, for the fourth amendment is written broadly. * * * As the fourth amendment bars unreasonable

> action, a reading taking [privacy and property] interests to the limits transfers to the federal judiciary the power to decide whether every public action is reasonable. What is left for the rest of the Constitution—or for state law and democratic choice? (J.A. 68-69, Easterbrook, J., concurring).

The Civil Rights Act, 42 U.S.C. § 1983 prohibits conduct: (1) by a person acting under color of state law; (2) which deprives a person of the rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 68 L.Ed.2d 420, 428, 101 S.Ct. 1908, 1913 (1981). An overly broad construction of § 1983 and the constitutional provision invoked may well permit litigants to use the federal courts to completely subsume areas of regulation traditionally left to the individual States and their democratic processes.

Section 1983 was originally enacted by Congress in 1871 to enforce the provisions of the Fourteenth Amendment against the States. *Monroe v. Pape*, 365 U.S. 167, 171, 5 L.Ed.2d 492, 496, 81 S.Ct. 473, 475 (1961), *overruled in part, not relevant here, by Monell v. New York Department of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978). Enacted against the backdrop of rampant Ku Klux Klan activity, § 1983 sought to accomplish three main aims: (1) to override certain kinds of state laws, (2) to provide a remedy where state law was inadequate and (3) to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. *Monroe*, 365 U.S. at 173-174. Essentially, § 1983 was enacted to provide:

> * * * a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth

> Amendment might be denied by the state agencies. *Monroe*, 365 U.S. at 180.

The instant cause does not present the type of situation that needs to be redressed pursuant to § 1983. Random misjudgment or misbehavior on the part of lower echelon state employees should not be regulated by the federal government under the guise of § 1983.

Justice Frankfurter, dissenting from the majority decision in *Monroe v. Pape*, warned against expansive interpretation of § 1983:

> [S]ince it is projected into the future, it is ambulatory in scope, the statute properly absorbing the expanding reach of its purpose to the extent that the words with which that purpose is conveyed fairly bear such expansion. But this admissible expansion of meaning through the judicial process does not entirely unbind the courts and license their exercise of what is qualitatively a different thing, namely, the formulation of policy through legislation. *Monroe*, 365 U.S. at 244 (Frankfurter, J., dissenting).

Petitioners ask this Court to do exactly what Justice Frankfurter feared. Here, by a fortuity of the deputy sheriffs' mere presence, petitioners seek § 1983 redress from the federal court system for what was essentially a garden variety landlord/tenant dispute. As this Court has oftentimes recognized, property interests "are created and their dimensions are defined by existing rules or understandings that stem from * * * state law." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 33 L.Ed.2d 548, 561, 92 S.Ct. 2701, 2709 (1972). Regulation of, and redress for, landlord/tenant disputes is an area that is peculiarly within the jurisdiction of the various States.

Petitioners challenge neither the usefulness nor the propriety of Illinois' Forcible Entry and Detainer Act, nor

its state remedies available to recompense petitioners for the property damage that they have suffered. Rather, they challenge the aberrant misconduct of lower echelon state officers. There is a crucial distinction between a challenge to an established state procedure and a property damage claim arising out of the misjudgment or misconduct of low level officers. In the latter situation, although the "under color of law" requirement may be literally satisfied, the "State action" required by the Fourteenth Amendment is not complete unless, and until, the State is unable to make the aggrieved individual whole for the damages he incurred at the hands of the state officers. *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978).

Under the instant set of facts, providing petitioner redress through the Federal Constitution would not serve any of the three aims for which § 1983 was enacted. This is what the Court of Appeals meant when it stated:

> Literally there was a "seizure" here, but to use a literal interpretation of a constitutional provision * * * would trivialize the amendment and gratuitously shift a large body of routine commercial litigation from the state courts to the federal courts. (J.A.58-59)

Divorcing the Federal Constitution and § 1983 from the notion of federalism, which is exactly what this Court would have to do to provide petitioners § 1983 redress, could begin the process of eventually subsuming an area of regulation traditionally and properly regulated by the individual States. This Court has often warned against reading the Constitution and § 1983 so as to create "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 47 L.Ed.2d 405, 413, 96 S.Ct. 1155, 1160 (1976).

In the instant cause, through a unique factual situation, petitioners have attempted to fashion a § 1983 cause of action. However, petitioners should not be afforded § 1983 redress for what is essentially a landlord/tenant dispute with incidental property damage. Section 1983 was not designed to "federalize" state tort claims. As this Court has recognized:

> Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. *Daniels v. Williams*, 474 U.S. 327, 332, 88 L.Ed.2d 662, 669, 106 S.Ct. 662, 665 (1986).

Through the democratic process, Illinois has fashioned a system of regulating "liability for injuries that attend living together in society." The Illinois Forcible Entry and Detainer Act, in conjunction with the tort claims mechanism, affords petitioners complete redress for the "random and unauthorized" property damage they have suffered at the hands of low level state employees. "Federalizing" the instant cause, through § 1983, could prove to be a very extensive and expensive remedy.

CONCLUSION

Respondents respectfully request that this Court affirm the decision of the United States Court of Appeals for the Seventh Circuit, which affirmed the District Court's order granting respondents' motion for summary judgment.

Respectfully submitted,

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